Supreme Court, U.S.
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No. 931447

In The

Supreme Court of the United States

October Term, 1993

DAVID E. AND JEAN E. KUEHL,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

ALEX KOMARIDIS
Counsel of Record
ALEX KOMARIDIS, P.C.
Attorney for Petitioners
35 Raymond Road
P.O. Box 165
Auburn, New Hampshire 03032
(603) 483-5707

4894
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

46 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the First Circuit err in affirming the dismissal of Petitioners' complaint, without giving the Petitioners an opportunity to amend?

LIST OF ALL PARTIES

Plaintiffs-Petitioners:

David E. Kuehl

Jean E. Kuehl

Defendants-Respondents:

Numerica Financial Corporation

Numerica Savings Bank, FSB

HomeBank, FSB

Federal Deposit Insurance Corporation

Resolution Trust Corporation

Michael Toomey, Officer

David Markle, Officer

Charles S. Reese, President

Ralph E. Jensen, President and CEO

John J. Reilly, Jr., Director

William S. Green, Director

Paul H. Harvey, Director

Robert J. Harrison, Director

Edward O. Powers, Director

Richard I. Winneg, Director

James F. Quirk, Jr., Director

John S. Gikas, Director

M. Mary Mongan, Director

Guy B. Miller, Director

Stewart S. Richmond, M.D., Director

Robert E. Dastin, Director

William H. Dunlap, Director

Reuell Leavitt, Director

Roland Chabot, Director

David Welsh, Director

Eli Isaacson, Director

Herman J. Caswell, Director

Bertrand Bryant, Director

Walter C. Smith, Director

Donald R. Morin, Director

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

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Magistrate's Report and Recommendation, *David E. Kuehl and Jean E. Kuehl v. Numerica Financial Corporation, et al.*, Civil 91-491-S D.N.H., July 23, 1992.

Order, *David E. Kuehl, et al v. Michael Toomey, et al.*, Civil No. 91-491-U D.N.H., Sept. 25, 1992.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28 United States Code, § 1254(1). The order of the United States Court of Appeals for the First Circuit sought to be reviewed was issued on November 17, 1993.

The Petitioners' petition for rehearing was denied by order dated December 7, 1993.

RULES INVOLVED

The rules involved in this case are Federal Rules of Civil Procedure, Rules 8(a); 8(e)1 and 2; 10(b); 15(a); 18(a); 19(a); 20(a) and 81(c). The text of is set forth in the Appendix, *infra*, 23a-27a.

STATEMENT OF FACTS

Petitioner David E. Kuehl had a long-standing, close working relationship with Respondents Numerica Savings Bank and HomeBank, and various of the banks' officers also named as defendants.

Over a period of years, David Kuehl had mortgages with the banks that totalled almost 1 million dollars.

In January, 1990, David Kuehl began to encounter some financial difficulties and sought assistance from the banks. However, no such assistance, though promised, was forthcoming.

In October, 1990, David Kuehl was advised that the banks

would proceed to take action against him under the terms of the various notes and mortgages. At Mr. Kuehl's insistence, the banks agreed to enter into negotiations in an effort to resolve the matter.

The negotiations extended over a period of approximately 7 months. During the course of those negotiations, the banks took several actions that were contrary to the agreement of the parties and which were detrimental to Mr. Kuehl.

The negotiations broke down in July, 1991 and actions were filed by the two banks in their respective counties. Mr. Kuehl responded with counter-claims in each of the two suits, and filed a separate suit against all Respondents in his home county seeking to consolidate all actions and claims.

On October 10, 1991, the two banks were declared insolvent. The Federal Deposit Insurance Corporation took over Numerica Savings Bank, and the Resolution Trust Corporation took over HomeBank. Shortly thereafter, all actions were removed to the United States District Court for the District of New Hampshire under the provisions of Title 12 U.S.C. § 1819(b).

A preliminary pretrial was held on February 2, 1992. At that time the Petitioners were ordered to replead in federal format pursuant to Federal Rules of Civil Procedure, Rule 81(c), and the Petitioners did so.

In his pre-trial order, the United States Magistrate indicated that he expected that many of the Respondents would be dismissed from the action.

Shortly after Petitioners' complaint was filed, all Respondents filed motions to dismiss to which the Petitioners objected.

On July 23, 1991 the United States Magistrate recommended that Petitioners' complaint be dismissed in its entirety for failure to comply with the short, plain statement requirement of Federal Rules of Civil Procedure, Rule 8(a). The Petitioners objected to the Magistrate's report and recommendation, and sought the opportunity to amend his complaint pursuant to Federal Rules of Civil Procedure, Rule 15.

By order dated September 25, 1992 Judge Juan M. Perez-Gimenez, of the District of Puerto Rico, sitting by designation, adopted the Magistrate's report and recommendation dismissing Petitioners' complaint. The order denied Petitioners the opportunity to amend under Fed. R. Civ. P. 15(a) by holding that Petitioners' restatement of their complaint under Fed. R. Civ. P. 81(c) constituted an amendment for purposes of Fed. R. Civ. P. 15(a)

Petitioners' petition for rehearing was denied, and an appeal to the United States Court of Appeals for the First Circuit was seasonably taken.

By order dated November 17, 1993, the United States Court of Appeals for the First Circuit upheld the decision of the District Court to dismiss the Petitioners' complaint.

On the issue of Petitioners' right to amend under Fed. R. Civ. P. 15(a), the court held that normally re-pleading under Fed. R. Civ. P. 81 does not constitute an amendment under Rule 15(a). However, in this case, the court held that the Magistrate's order required an amendment to Petitioners' pleading and that such a requirement served as the amendment allowed under Fed. R. Civ. P. 15(a).

The Court of Appeals also held that while the Petitioners' complaint was overwritten, the court would be inclined to find the

dismissal overly harsh. However, the court also found that the Petitioners had flouted the court's order by failing to conform to the concise pleading requirements of Fed. R. Civ. P. 8(a), and by their failure to reduce the number of defendants considerably as required by the Magistrate Judge.

The Petitioners sought a rehearing before the Court of Appeals on the grounds that the court's holding regarding Fed. R. Civ. P. 81(c) and 15(a) could not have been anticipated by the Petitioners as no prior case law exists on the issue, and that the Magistrate Judge's expectations that a number of defendants would be dismissed was inappropriate given the fact that at the time that he had stated his expectations, he had before him nothing other than Petitioners' state court writ of summons.

The petition for rehearing was denied on December 7, 1993.

BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The federal jurisdiction of the United States District Court for the District of New Hampshire was invoked by the Federal Deposit Insurance Company as Receiver for Respondent Numerica Savings Bank, pursuant to Title 12, United States Code, § 1819(b).

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the First Circuit appears to have sanctioned a departure by the United States District Court for the District of New Hampshire from the accepted and usual course of judicial proceedings to the extent that it requires this Court to exercise its power of supervision.

The Court of Appeals has upheld the District Court's order denying the Petitioners the opportunity to amend their complaint, and dismissing the complaint in its entirety.

The basis for the Court of Appeals' decision was that the Petitioners failed to comply with the Magistrate Judge's initial pre-trial order requiring the Petitioners to replead their complaint in federal format conforming to the concise pleading requirements of Fed. R. Civ. P. 8(a), and by failing to dismiss a substantial number of the named defendants.

In reaching that conclusion, the Court of Appeals held that the Petitioners' restatement of his complaint pursuant to Fed. R. Civ. P. 81(c) served to exhaust their right to amend the complaint pursuant to Fed. R. Civ. P. 15(a).

The Magistrate Judge's preliminary pretrial order was issued on February 5, 1992, several days after a short pre-trial conference. At the time that the order was issued, the Magistrate had before him only the state court writs of summons of the Petitioners and the Respondent banks. While the Petitioners had filed counter-claims in the two bank actions, no responsive pleadings other than a general denial, was filed by any defendant in the Petitioners' action against all defendants.

It is on the basis of this very meager record that the Magistrate Judge issued his order requiring Petitioners to replead their case in federal format and to reduce the number of defendants in the action.

However, given that very meager record, the Magistrate Judge had nothing before him that would warrant his conclusion that a substantial number of the defendants should be dismissed.

This Court has consistently held that the Federal Rules of Civil Procedure should be interpreted and applied so as to do justice and to permit an adjudication on the merits. *Surowitz v. Hilton Hotels Corp.*, 86 S. Ct. 845, 383 U.S. 363, 15 L. Ed. 2d 807, *reh. denied,* 86 S. Ct. 1333, 384 U.S. 915, 16 L. Ed. 2d 367 (1966);

Conley v. Gibson, 78 S. Ct. 99, 355 U.S. 41, 2 L. Ed. 2d 80 (1957); *Foman v. Davis*, 83 S. Ct. 227, 371 U.S. 178, 9 L. Ed. 2d 222 (1962).

Fed R. Civ. P. 8(a) requires that a pleader state his cause in a short plain statement. However, compliance with that rule must be determined with reference to all other applicable pleading provisions contained in the Federal Rules of Civil Procedure.

Rule 8(e)(1) states that each averment shall be simple, concise and direct. Rule 8(e)(2) permits claims in the alternative, and permits such claims to be stated in separate counts.

Rule 10(b) states that averments of a claim shall be made in separate numbered paragraphs, each paragraph containing a statement of a single set of circumstances. That rule goes on to say that each claim founded on a separate transaction should be stated in a separate count.

Rule 18(a) permits a plaintiff to state as many claims legal, equitable, or maritime as the party has against an opposing party.

Rule 19(a) requires that a party be joined if in the absence of that person complete relief cannot be accorded to those already parties.

Rule 20(a) permits the joinder of parties defendant when a right to relief is asserted against them arising out of the same series of transactions.

In preparing his restated complaint, the Petitioners attempted to give effect to each of the required provisions of the Federal Rules of Civil Procedure.

The number of separate claims stated by the Petitioners were

required, and permitted by the rules, because of the number of defendants involved, the extended period of time over which the Petitioners dealt with the Respondents, and the various actions taken by the Respondents that caused harm to the Petitioners .

The large number of defendants named was also required by the facts and circumstances of this case, and permitted if not required, by the rules.

The Respondents can be broken into 4 separate classes: (1) those who were officers of the bank; (2) those who were members of the Board of Directors of the banks; (3) the banks themselves; and (4) the Federal Deposit Insurance Corporation and Resolution Trust Corporation as receivers of the banks.

The officers of the bank were necessary parties as they dealt directly with the Petitioners in all of their dealings with the bank up to the time that the banks stated their intention to take action against the Petitioners in October, 1990.

The directors of the banks were necessary parties as they, or some number of them, were members of the banks' loan committees, and those committees made the decisions regarding the initial loans to the Petitioners, the subsequent loans they requested, and the possible solutions for a workout during the Petitioners' negotiations with the banks during the period from November 1990 through July, 1991.

The banks are appropriate defendants as principals of the various officers and directors, and the Federal Deposit Insurance Corporation and Resolution Trust Corporation were necessary parties as they had become the receivers of the two banks.

Each group of defendants was necessary for the complete resolution of the case. If the officers were omitted, the other

defendants could easily identify the officers as being primarily responsible claiming that their actions were *ultra vires*, thereby absolving the remaining defendants from liability at least in part.

The exact same argument applies to the director if they had not been named.

While it is undoubtedly true that the claims as to some number of the directors might have been dismissed after discovery was completed, Petitioners had no way of determining, at the time of pleading, which directors it might be.

Given the facts as the Petitioners knew them at the time of the Magistrate Judge's order, the Petitioners had little choice but to plead their case at substantial length.

By issuing the order that he did, the Magistrate Judge, as found by the Court of Appeals, wanted the Petitioners to dismiss a substantial number of the defendants at the time that the Petitioners restated their complaint.

The Petitioners' failure to comply with the Magistrate's stated desire led to the Magistrate's report and recommendation that the Petitioners' complaint be dismissed.

The Petitioners are unaware of any rule or case that holds that a judge may impose, at the very beginning of a case, any limits on whom a plaintiff may sue or what claims may be stated in his complaint. To the extent that the Magistrate Judge did so in this case, he exceeded his authority, and violated or misapplied the Federal Rules of Civil Procedure, and the Court of Appeals sanctioned his action.

In issuing the order that he did, the Magistrate Judge placed the Petitioners in an impossible position. Failure to dismiss would,

and did, lead to dismissal of the complaint, while compliance with the order would require that the Petitioners blindly give up claims and defendants without knowing what effect such an action would have on their ability to prove the case.

Once the Petitioners' re-stated complaint was filed, it was promptly and extensively attacked by motions to dismiss by all parties. The Petitioners filed their objections to each of those motions. Consequently, at the time that the Magistrate Judge issued his report and recommendations, the matter was ripe for a decision based on the law and arguments made by all parties. However, rather than deciding the issues presented by these various pleadings, the court chose to dismiss based upon the initial pre-trial order.

The Petitioners objected to the Magistrate's report and recommendation, and requested an opportunity to amend the complaint pursuant to Fed. R. Civ. P. 15(a). The Judge's order adopting the Magistrate's report and recommendation and dismissing the complaint also stated for the first time that the Petitioners lost any such opportunity to amend by virtue of their repleading under Fed. R. Civ. P. 81(c). The court's decision on that issue appears to be the first time that that particular issue has ever arisen, and there appears to be no case law anywhere ruling on the same question. As a result, the Petitioners could not have anticipated the court's ruling. And, having failed to anticipate that ruling, the Petitioners were again trapped in a position where they could take no effective action to correct the apparent problem.

By virtue of the various orders of the courts, the Federal Rules of Civil Procedure became a trap designed to preclude the Petitioners from pursuing their claim rather than the tool by which their bona fide complaint could be carried to an adjudication on the merits.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

ALEX KOMARIDIS
ALEX KOMARIDIS, P.C.
Attorney for Petitioners
Auburn, N.H. 03032
(603) 483-5707

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED DECEMBER 7, 1993

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1419

DAVID E. AND JEAN E. KUEHL,
Plaintiffs-Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.,
Defendants-Appellees.

BEFORE

BOUDIN, Circuit Judge,
COFFIN and CAMPBELL, Senior Circuit Judges.

ORDER OF COURT

Entered: December 7, 1993

Upon consideration of appellants' petition for rehearing,

It is ordered that the petition for rehearing be denied.

By the Court:
FRANCIS P. SCIGLIANO
Clerk

[cc: Messrs. Komaridis and Mills]

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED NOVEMBER 17, 1993

United States Court of Appeals
For the First Circuit

No. 93-1419

DAVID E. AND JEAN E. KUEHL,

Plaintiffs, Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Juan M. Perez-Gimenez,* *U.S. District Judge*]

Before

Boudin, *Circuit Judge*,
Coffin and Campbell, *Senior Circuit Judges*.

Alex Komaridis for appellants.
Richard E. Mills for appellees.

November 17, 1993

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* Of the District of Puerto Rico, sitting by designation.

Appendix B

COFFIN, *Senior Circuit Judge*. The district court dismissed plaintiffs' 43-page, 358-paragraph complaint because of its failure to conform to the concise pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure. Plaintiffs contend that the court erred in doing so, and in failing to give them an opportunity to file an amended complaint. We cannot say that the district court abused its discretion and, accordingly, affirm the dismissal.

I. *Procedural Background*

Plaintiffs David and Jean Kuehl originally filed this lender liability lawsuit in state court, seeking damages from two banks and numerous bank officers and directors based on foreclosures against their properties and their resulting inability to obtain credit. The state court complaint consisted of 19 single-spaced typed pages containing 36 counts against 28 defendants.

In October 1991, the two banks were taken over by federal agencies, and the action was removed to federal court. Following a status conference in early February 1992, a magistrate judge ordered plaintiffs to submit "an amended complaint" to conform the pleadings to the concise pleading requirements of Fed. R. Civ. P. 8(a).[1] The order noted the magistrate's expectation that "a review of the proposed amended complaint and the results of Rule 12(b)(6) motions [to dismiss for failure to state a claim] will reduce considerably the number of parties in the action."

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1. The relevant portion of Rule 8(a) states:

> A pleading which sets forth a claim for relief . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . .

Appendix B

Several days later, plaintiffs filed a 43-page, now double-spaced, complaint with the same number of counts, and including all of the original defendants, plus the two federal agencies. The complaint set forth, *inter alia,* eight separate counts of respondeat superior, eight counts of negligent supervision, six counts of breach of good faith, three counts of breach of fiduciary duty, three counts of negligence, and two counts of conspiracy.[2]

Defendants promptly filed motions to dismiss. They urged that the entire complaint be dismissed for failure to provide a short and plain statement of the claims as required by Rule 8(a)(2), and as ordered by the magistrate judge. The motions alternatively sought dismissal against the individual defendants, who had been sued only in their official capacities, and also challenged certain

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2. The complaint's prolixity is illustrated by the counts alleged against the individual members of HomeBank's board of directors. Two of the negligence counts were against this group. One count (Count III) alleged breach of a duty to ensure that all terms and conditions of loans between the Kuehls and the bank were fulfilled and the other (Count IV) alleged breach of a duty to supervise the officers of the bank to ensure that the officers fulfilled the bank's obligations to its customers, including the Kuehls. The complaint also included two negligent supervision counts (Counts VIII and XII) charging these same defendants with essentially the same conduct. The complaint also alleged multiple respondeat superior claims against HomeBank (Counts IX, XIII, XV, XX) as the responsible employer and principal of the officers and directors.

The counts against HomeBank's president, Charles Reese, included one for negligence (Count II), alleging that he "failed to properly supervise his subordinates and permitted the bank to breach its agreement with Kuehl," as well as two for negligent supervision (Counts VII and XI), alleging that he breached his duty and responsibility to Kuehl by failing to correct misrepresentations made to Kuehl by Reese's subordinates.

These examples are by no means exhaustive.

counts as failing to state claims upon which relief could be granted.

Plaintiffs objected to the motions, asserting that the complaint did conform to the requirements of Rule 8(a), and that every count stated a viable cause of action. They did not seek leave to further amend the complaint.

On July 23, 1992, the magistrate judge issued his Report and Recommendation calling for dismissal of the complaint because it violated Rule 8(a). He found that, despite the explicit directions in his February order, plaintiffs had "proceeded to file a verbose and redundant complaint containing the same number of counts as the original." He noted that several counts were nearly identical to each other, several other counts were ambiguous as to which defendant was named, and "[t]he possible substance of the claim is hidden in prolixity."

The Kuehls filed an objection to the recommended dismissal, complaining that no consideration had been given to the merits of their claims or to their "right" to further amend. This complaint was their first in the federal format, they pointed out, and Fed. R. Civ. P. 15(a) allows a party one amendment "as a matter of course" before a responsive pleading is served.[3] Plaintiffs did not, as part of their objection, seek leave to amend or submit a proposed amended complaint.

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3. The relevant portion of Fed. R. Civ. P. 15(a) states:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Appendix B

Plaintiffs did attempt to file a motion to amend in early September, attaching a proposed amended complaint. They also filed a dismissal without prejudice of all claims against the 21 defendants who were directors of the two banks. The court refused the motion to amend, however, because plaintiffs had not sought concurrence from the defendants, as required by Local Rule 11. No subsequent attempt was made to obtain concurrence or refile the pleading.

On September 25, 1992, the district court issued an order adopting the magistrate judge's recommendation that the complaint be dismissed in its entirety. The court noted that plaintiffs had failed to file an amended complaint meeting the requirements of Rule 8(a), as ordered, "even after the Magistrate Judge gratuitiously gave plaintiffs rather specific guidance as to how the complaint should be amended."

Plaintiffs filed a Motion for Reconsideration, stating that, in attempting to balance the various federal pleading rules, "[p]laintiffs'-attorney unintentionally violated Rule 8(a)" and that dismissal with prejudice was too harsh a penalty under the circumstances. For the first time, plaintiffs submitted a proper request for permission to amend their complaint, although they did not submit a proposed new complaint. The district court denied the motion for reconsideration on March 12, 1993. This appeal followed.

The Kuehls now attack the dismissal on two fronts. First, they claim that they are absolutely entitled to another round of repleading under Rule 15(a) because they have filed only one federal complaint and defendants have not filed responsive pleadings.[4] Second, they argue that the deficiencies of their

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4. It is well established in this circuit that motions to dismiss are not responsive (Cont'd)

complaint were not so severe as to warrant a dismissal without the opportunity to amend.

II. *The Right to Amend*

Under Rule 81(c) of the Federal Rules of Civil Procedure, an action that is removed from state to federal court need not be repled "unless the court so orders." The Kuehls maintain that their original federal complaint was a repleading ordered pursuant to Rule 81(c), but that — contrary to the district court's conclusion — that redrafting did not use up their Rule 15(a) right to amend their complaint once as a matter of course.

We can agree, generally, with the principle that a repleading ordered under Rule 81(c) does not automatically deprive the plaintiff of the one-time option to amend granted by Rule 15(a). This seems particularly so when the repleading involves simply a change of format to fit the federal court model.

In this case, however, the magistrate judge explicitly ordered an *amended* complaint that was intended to contain substantive changes to meet Rule 8(a)'s requirements. The plaintiffs, therefore, had a chance to make meaningful modifications to their complaint and, indeed, were given some advice about how to do so. They point to no authority supporting the proposition that they are entitled, *as a matter of right,* to a second chance to improve the substance of their complaint. The fact that plaintiffs sauandered their one guaranteed opportunity by making only stylistic changes does not yield them another.

(Cont'd)

pleadings. *See Correa-Martinez v. Arrillaga- Belendez,* 903 F.2d 49, 59 n.8 (1st Cir. 1990).

Appendix B

III. *Too Tough a Sanction?*

A district court has the power to dismiss a complaint when a plaintiff fails to comply with the Federal Rules of Civil Procedure, including Rule 8(a)(2)'s "short and plain statement" requirement. *Vakalis v. Shawmut Corp.*, 925 F.2d 34, 36 (1st Cir. 1991); *Mangan v. Weinberger*, 848 F.2d 909, 911 (8th Cir. 1988). *See* Fed. R. Civ. P. 41(b). Its decision to do so is reviewable only for abuse of discretion. *Mangan*, 848 F.2d at 911; *HMG Property Investors v. Paraue Indus. Rio Canas*, 847 F.2d 908, 916-17 (1st Cir. 1988).

Plaintiffs now acknowledge a technical violation of Rule 8(a), conceding that their complaint is excessively long and unnecessarily redundant. They claim, however, that dismissal with prejudice is too drastic a sanction because this was "unintentional error" on the part of plaintiffs' attorney, who believed that it was essential to plead in detail in light of the magistrate's stated expectation that many defendants and some claims would be dismissed. By drafting counts in numerous, short, separate paragraphs, plaintiffs explain, they sought to permit any dismissed counts to be excised without affecting the remainder of the claims or the complaint as a whole.

Were plaintiffs' confessed overdrafting their only sin, we would be inclined to agree that dismissal was an overly harsh penalty. Our federal rules promote the disposition of claims on the merits rather than on the basis of technicalities, *see Foman v. Davis*, 371 U.S. 178, 181-82 (1962), and courts should be reluctant to impose a dismissal with prejudice for a rules violation that is neither persistent nor vexatious, particularly without some review of the merits.

These plaintiffs are culpable for more than simply an

overwritten complaint, however. Their faulty pleading was not their first, but an amended version that had changed only superficially from the state court complaint, despite an order that it conform to the *concise* pleading requirements of Rule 8(a). Additionally, the magistrate judge had fairly explicitly telegraphed that the number of defendants should be "considerably" reduced. Instead, plaintiffs added two more. When plaintiffs finally attempted six weeks after the magistrate's decision to file a motion to amend, they failed to follow local rules. At no time did they properly offer the court a proposed amended complaint to cure the deficiencies.

Thus, by the time the district court acted on the magistrate judge's recommendation, it had before it a flouted order and no indication that plaintiffs were ready to conform to Rule 8(a)'s requirements. Their one apparent attempt to comply — the motion that ran afoul of Local Rule 11 — had been abandoned. And defendants already had expended considerable time and expense responding to the defective complaint. *See Newman v. Commonwealth of Mass.*, 115 F.R.D. 341, 344 (D. Mass. 1987) (recognizing role of "'pragmatic matters,'" such as time and expense for defendants and court, in deciding whether complaint should be dismissed).

In these circumstances, the district court's decision to dismiss, though very severe, does not strike us as beyond the pale. It is well settled that the question on review "is not whether we would have imposed a more lenient penalty had we been sitting in the trial judge's place, but whether the trial judge abused his discretion in imposing the penalty he did." *Spiller v. U.S.V. Laboratories, Inc.*, 842 F.2d 535, 537 (1st Cir. 1988). We believe this decision was within the wide boundaries of the court's discretion. *See* 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*

§ 1217, at 178 (1990) ("[I]n some circumstances if a party fails or refuses to file an amended and simplified pleading or does not exercise good faith in purporting to do so, the severe sanction of a dismissal on the merits may be warranted."); *see also Jones v. Winnepesaukee Realty*, 990 F.2d 1, 5 (1st Cir. 1993) ("Trial judges enjoy great latitude in carrying out case-management functions.")

The order of dismissal is therefore affirmed.

APPENDIX C — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED NOVEMBER 17, 1993

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1419

DAVID E. AND JEAN E. KUEHL,

Plaintiffs-Appellants,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, ET AL.,

Defendants-Appellees.

JUDGMENT

Entered: November 17, 1993

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of dismissal is affirmed.

By the Court:

FRANCIS P. SCIGLIANO
Clerk.

[cc: Messrs. Komaridis and Mills]

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE FILED OCTOBER 9, 1992

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Civil Action No. 1:91-cv-00491-U

Kuehl

v.

FDIC

JUDGMENT

JUDGMENT in accordance with the Report and Recommendation of Magistrate Judge Justo Arenas dated July 23, 1992, the stipulation of dismissal dated September 4, 1992 and the order of Judge Juan Perez Gimenez dated September 25, 1992 (Signed by Clerk James R. Starr)

By the Court,

s/ James R. Starr
Clerk

Date: October 9, 1992

cc: Alexis Komaridis, Esq.
Donald J. Williamson, Esq.
Richard E. Mills, Esq.
Steven A. Solomon, Esq.
Diane L. Perin, Esq.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE FILED SEPTEMBER 25, 1992

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Civil No. 91-491-U

David E. Kuehl, et al.

v.

Michael Toomey, et al.

ORDER

Present before the court is a Report and Recommendation rendered by very able and competent Magistrate Judge Justo Arenas recommending that defendants' motion to dismiss the complaint filed on February 10, 1992, be dismissed in its entirety.

In essence, the Report contains a succinct version of the facts as best as could be gleaned from the unquestionably lengthy, verbose and redundant *amended* complaint. This case was commenced at the Rockingham County Superior Court. After the action was removed to this U.S. District Court, Magistrate Judge Arenas ordered plaintiffs specifically to file an *amended* complaint to conform the one originally filed at the state court[1] to the concise pleading requirements of Rule 8(a), Fed. R. Civ. P.

The *amended* 43-page complaint that the plaintiffs filed on

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1. The complaint as originally filed contained 19 pages of allegations and a total of 36 causes of action. Named as defendants were 28 individual officers and various financial institutions as well as the FDIC and RTC.

the heels of the Magistrate Judge's Order contained 36 enumerated causes of action in 358 separately numbered paragraphs naming 30 defendants in the caption. Not surprisingly, motions to dismiss were filed anent the flagrant violation of the Magistrate Judge's Order by plaintiffs.

The plaintiffs predicate their objections to the Report and Recommendation on two grounds:

1. the plaintiffs were ordered to *replead* their cause in the federal format, and *did so* (underlining ours); and

2. their complaint was the first pleading in the federal format, and since no answer has been filed by any defendant, they be allowed to replead under Fed. R. Civ. P. 15(a).

The short answer to plaintiff's objections is that:

A. Yes, they were ordered to replead their case in the federal format pursuant to Fed. R. Civ. P. 8(a) and 81(c); and

B. No, they did not comply with the Order, even after the Magistrate Judge gratuitously gave plaintiffs rather specific guidance as to how the complaint should be amended.

For these reasons, the Court hereby ORDERS that the Report and Recommendation be and it is hereby Approved and Adopted, and in accordance therewith the defendants' Motion to Dismiss is hereby Granted and the *Amended* Complaint filed on February 10, 1992, is hereby Dismissed in its entirety.

Appendix E

s/ Juan M. Perez-Gimenez
Juan M. Perez-Gimenez
United States District Judge

September 25, 1992

Concord, New Hampshire,
Sitting by Designation

cc: Alexis Komaridis, Esq.
Donald J. Williamson, Esq.
Richard E. Mills, Esq.
Steven A. Solomon, Esq.
Diane L. Perin, Esq.

APPENDIX F — MAGISTRATE'S REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE FILED JULY 23, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

CIVIL 91-491-S

DAVID E. KUEHL and JEAN E. KUEHL,

Plaintiffs

v.

NUMERICA FINANCIAL CORPORATION, NUMERICA SAVINGS BANK, FSB, HOMEBANK, FSB, et al.,

Defendants

MAGISTRATE'S REPORT AND RECOMMENDATION

Plaintiffs commenced this action before the Rockingham County Superior Court with a nineteen page writ containing thirty-six causes of actions. Numerica Savings Bank (NSB), Homebank (HB), twenty-five individual officers and directors of NSB and HB, Federal Deposit Insurance Corporation (FDIC) as receiver for NSB, RTC as receiver for HB, and Numerica Financial Corporation (NFC), which was the parent holding company for NSB and HB, were all named as defendants. After FDIC removed the action to federal court, I specifically ordered plaintiffs to file an amended complaint "to conform the pleadings to the concise pleading requirements of Rule 8(a), Federal Rules of Civil Procedure. On February 10, 1992, plaintiffs filed their twenty page amended complaint which also contained thirty-six causes of action.

Appendix F

Among all the defendants, two motions to dismiss were filed alleging various grounds for dismissal. Defendants maintain that the entire complaint must be dismissed because plaintiffs failed to provide a short and plain statement of the claim as required by Rule 8 of the Federal Rules of Civil Procedure. In the alternative, defendants argue that the counts for fraudulent misrepresentation must be dismissed for failure to aver fraud with particularity as required by Rule 9(b), Federal Rules of Civil Procedure, and that numerous counts must be dismissed for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure.

Since the facts as alleged in plaintiff's complaint are extremely lengthy, I will provide a succinct version of the facts. Throughout the 1980's, David Kuehl obtained financing from NSB and HB for the purchase and renovation of various properties for rental and investment purposes. During 1989, an officer of HB approached Kuehl on various occasions about purchasing a property in North Conway from the bank. After negotiations, Kuehl agreed to purchase the property and took out an interest-only mortgage for $175,000 (the entire purchase price plus renovation costs) with HB. By January 1990, both banks held mortgages and notes in the amount of approximately one million dollars on Kuehl's properties, including his primary residence. Incurring financial difficulties shortly after purchasing the North Conway property, Kuehl requested an additional loan from HB and NSB. The additional loan was denied and Kuehl consequently defaulted on his existing financial obligations to NSB and HB. As a result of Kuehl's default, both banks foreclosed on Kuehl's properties, reported him to a credit agency, and sued him for failing to comply with the terms of the financing agreements. Kuehl and his wife, co-signer on all notes and mortgages, responded by filing this extensive lender-liability suit seeking damages for the loss of

their properties and ability to obtain credit for business or personal purposes as a result of the banks' actions.

A properly pleaded complaint under the Federal Rules of Civil Procedure contains "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Plaintiffs argue that they complied with the pleading requirements. They concede that their complaint is long, repetitious, and even unclear. Yet, plaintiffs maintain that the action must not be dismissed because the facts of the case necessitate a lengthy and redundant complaint. The only case cited in plaintiff's memorandum (regarding a Rule 8 dismissal), *Wade v. Johnson Controls Inc.*, 693 F.2d 19 (2d Cir. 1982), simply does not buttress their argument. *Wade* determined that the appellant's complaint met the Rule 8(a) requirements of providing adequate notice of the grounds for relief. *Id.* at 22. However, the issue in the instant case does not pertain to notice, but rather to the question of a short and plain statement of the claim.

When a party fails to comply with the rules of procedure, including Rule 8, the district court has the power to dismiss. *Vakalis v. Shawmut Corp.*, 925 F.2d 34, 36 (1st Cir. 1991). In fact, several district courts hold that an action will be dismissed under Rule 8 for failure to file a "simple, concise, and direct" complaint. *See. e.g., Schmidt v. Herrmann*, 614 F.2d 122 (9th Cir. 1980): *Neuman v. Massachusetts*, 115 F.R.D. 341 (D. Mass. 1987). In the present case, the amended complaint repeatedly and unclearly alleges that Mr. Kuehl lost his properties and income as a result of HB and NSB's unlawful actions. However, as defendants point out, several counts in the complaint are nearly identical to one another, several other counts are ambiguous as to which defendant is named, and the complaint as a whole is unquestionably lengthy. Moreover, after being ordered to file an amended complaint to

adhere to Rule 8 requirements, plaintiffs proceeded to file a verbose and redundant complaint containing the same number of counts as the original. The possible substance of the claim is hidden in prolixity and therefore violates the "short and plain" requirement of the Federal Rules. Accordingly, I recommend that defendants' motion to dismiss be granted.

Under the provisions of Rule B, Rules for the Magistrate's Duties in the United States District Court at Concord for the District of New Hampshire, any party who objects to this report and recommendation must file a written objection thereto with the Clerk of this Court within ten (10) days of the party's receipt of this report and recommendation. The written objections must specifically identify the portion of the recommendation, or report to which objection is made and the basis for such objections. Failure to comply with this rule precludes further appellate review. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Borden v. Secretary of Health & Human Servs.*, 836 F.2d 4, 6 (1st Cir. 1987); *Scott v. Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *United States v. Vega*, 678 F.2d 376, 378-79 (1st Cir. 1982); *Park Motor Mart. Inc. v. Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980).

July 23, 1992

s/ Justo Arenas
JUSTO ARENAS
Magistrate Judge
Sitting by Designation

cc: Alexis Komaridis, Esq.
Donald J. Williamson, Esq.
Richard E. Mills, Esq.
Steven A. Solomon, Esq.
Diane L. Perin, Esq.

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE DATED FEBRUARY 5, 1992

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

#C-491-S

FDIC, et al.

v.

David E. and Jean E. Kuehl, et al.

ORDER

STATUS/SETTLEMENT CONFERENCE REPORT AND ORDER

David and Jean Kuehl filed a civil action in the Superior Court for Rockingham County against twenty-eight parties in a thirty-six count complaint. In order to conform the pleadings to the concise pleading requirements of Rule 8(a), Federal Rules of Civil Procedure, an amended complaint is to be filed by February 12, 1992. Forty-five days are allowed after that date to answer or otherwise plead. It is anticipated that a review of the proposed amended complaint and the results of Rule 12(b)(6) motions will reduce considerably the number of parties in the action. I will recommend to the court the ruling(s) on the motions to dismiss.

In the spirit of attempting to settle these cases, the Kuehls are to provide FDIC with a financial statement acceptable in form to the FDIC and copies of federal income tax returns filed during the

last two years. This information is to be provided by February 12, 1992. Parties are to inform me by March 20, 1992 the results of their attempts to settle. I will schedule another conference as the need arises.

February 5, 1992

s/ Justo Arenas
Justo Arenas
Magistrate Judge, Sitting by Designation

Donald J. Williamson, Esq.
Steven A. Solomon, Esq.
Alex Komaridis, Esq.
Richard E. Mills, Esq.
Diane L. Perin, Esq.
Nathaniel H. Speights, Esq.

APPENDIX H — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE FILED MARCH 12, 1989

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil No. 91-491-U

DAVID E. KUEHL and JEAN E. KUEHL,

Plaintiffs

v.

NUMERICA FINANCIAL CORPORATION NUMERICA SAVINGS BANK, FSB, HOMEBANK, FSB, et al,

Defendants

ORDER

Plaintiffs' motion for reconsideration (docket #35) is hereby DENIED.

IT IS SO ORDERED.

San Juan, Puerto Rico, March 12, 1989.

s/ Juan M. Perez-Gimenez
JUAN M. PEREZ-GIMENEZ
U.S. District Judge

cc: Alexis Komaridis, Esq.
Donald J. Williamson, Esq.
Richard E. Mills, Esq.
Steven A. Solomon, Esq.
Diane L. Perin, Esq.

APPENDIX I — FEDERAL RULES OF CIVIL PROCEDURE

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs to new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

* * *

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

* * *

Appendix I

Rule 10. Form of Pleadings

* * *

(b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

* * *

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

* * *

Appendix I

Rule 18. Joinder of Claims and Remedies

(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.

* * *

Rule 19. Joinder of Persons Needed for Just Adjucation

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

* * *

Appendix I

Rule 20. Permissive Joinder of Parties

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

* * *

Rule 81

* * *

(c) Removed Actions. These rules apply to civil actions removed to the United States district court from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the

action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed in the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.

* * *